

Commonwealth Electoral (Authorisation of Voter Communication) Determination 2021

EXPLANATORY STATEMENT

Issued by the Electoral Commissioner under subsection 321D(7) of the *Commonwealth Electoral Act 1918*

Overview

Section 321D of the *Commonwealth Electoral Act 1918* (the Electoral Act) and section 110C of the *Referendum (Machinery Provisions) Act 1984* (the Referendum Act) impose obligations on certain individuals and disclosure entities in relation to the authorisation of electoral matter and referendum matter, respectively. This is to ensure that voters know who has communicated or approved the communication. Paragraph 321D(7)(b) of the Electoral Act enables the Electoral Commissioner to determine, by legislative instrument, requirements relating to notifying particulars for the purposes of the Electoral Act, Referendum Act and certain broadcasting Acts described below.

The authorisation requirements are subject to exceptions set out in subsections 321D(3) and (4) of the Electoral Act and subsections 110C(3) and (4) of the Referendum Act. Paragraph 321D(7)(a) of the Electoral Act enables the Electoral Commissioner to determine, by legislative instrument, further exceptions to the notification requirements relating to the authorisation of electoral matter and referendum matter.

This instrument sets out:

- requirements for notifying particulars in relation to a communication for the purposes of the Electoral Act, Referendum Act and certain Broadcasting Acts; and
- communications for the purposes of paragraph 321D(3)(b) of the Electoral Act and paragraph 110C(3)(c) of the Referendum Act – in other words, communications which are exempt from the authorisation requirements.

Consultation

The Australian Electoral Commission (AEC) consulted with all registered parliamentary parties, all independent members of the House of Representatives and independent Senators and all registered political campaigners on the review of the *Commonwealth Electoral (Authorisation of Voter Communication) Determination 2018* (the 2018 Determination). The Department of Infrastructure, Transport, Regional Development and Communications was also consulted on proposed changes to the authorisation requirements for communications broadcast in languages other than English.

The AEC received responses from The Liberal Party of Australia, the Australian Labour Party, the Australian Greens and the Australian Nursing & Midwifery Federation.

For the purposes of the Electoral Act, the *Commonwealth Electoral (Authorisation of Voter Communication) Determination 2021* (the Determination) now, amongst other things:

- requires particulars in relation to a communication to be notified in English and any other language used for the rest of the communication;
- requires particulars in relation to a communication to be formatted and placed in a certain way so as to be legible and reasonably prominent;
- sets out where the particulars of a printed communication must be notified and where or when the particulars of a non-printed communication such as speech, music or electronic billboard must be notified; and
- exempts media releases and envelopes that contain the name and address of the notifying entity.

The Determination also sets out placement and language requirements for communications broadcast by radio or television that are subject to the *Australian Broadcasting Corporation Act 1983*, *Broadcasting Services Act 1992* or the *Special Broadcasting Service Act 1991*.

As stakeholders were consulted in relation to the proposed changes to the 2018 Determination, and relevant feedback incorporated into the Determination, no further consultation was undertaken.

Regulation Impact Statement

The Office of Best Practice Regulation was consulted in the preparation of the Determination and assessed that no Regulation Impact Statement was required as the Determination would be likely to have only minor regulatory impacts (**OBPR reference: 23384**).

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

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This Disallowable Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of Disallowable Legislative Instrument

This Disallowable Legislative Instrument is made under subsection 321D(7) of the *Commonwealth Electoral Act 1918* (the Electoral Act), which enables the Electoral Commissioner to determine, by legislative instrument:

- further exceptions to the authorisation requirements relating to certain electoral matter and referendum matter; and
- requirements for notifying particulars in relation to a communication for the purposes of the Electoral Act, *Referendum (Machinery Provisions) Act 1984* (Referendum Act), *Australian Broadcasting Corporation Act 1983*, *Broadcasting Services Act 1992* and the *Special Broadcasting Service Act 1991*.

Human rights implications

This Disallowable Legislative Instrument does not engage any of the applicable rights or freedoms. This is because the Instrument does not itself impose the authorisation requirements which engage particular rights and freedoms – it merely sets out exceptions to those requirements as well as specifying the requirements for notifying particulars in relation to a communication. The authorisation requirements themselves are imposed by section 321D of the Electoral Act and section 110C of the Referendum Act.

The explanatory memorandum to the *Electoral and Other Legislation Amendment Bill 2017* discusses the authorisation requirements and the applicable rights and freedoms. Specifically, those provisions engage the following rights as provided for in the International Covenant on Civil and Political Rights:

- the right to take part in public affairs and elections, as set out in Article 25;
- the right to freedom of opinion and expression, as set out in Article 19; and
- the prohibition on interference with privacy and attacks on reputation, as set out in Article 17.

However, the explanatory memorandum concludes that to the extent the authorisation provisions may limit human rights, those limitations are reasonable, necessary and proportionate.

Conclusion

This Disallowable Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

Explanation of the provisions - Commonwealth Electoral (Authorisation of Voter Communication) Determination 2021

Section 1 – Name of instrument

The name of the instrument is the *Commonwealth Electoral (Authorisation of Voter Communication) Determination 2021* (the Determination).

Section 2 – Commencement

The Determination commences on the day after it is registered.

Section 3 – Authority

The Determination is made under subsection 321D(7) of the *Commonwealth Electoral Act 1918* (the Electoral Act).

Section 4 – Schedules

This section gives effect to Schedule 1, which repeals the *Commonwealth Electoral (Authorisation of Voter Communication) Determination 2018* (the 2018 Determination).

Section 5 – Definitions

This section specifies the meaning of terms that have been used throughout the Determination.

Part 2 – Electoral and referendum matter exceptions

Section 6 – Purpose of this Part

This section provides that Part 2 of the Determination is made for the purposes of paragraph 321D(7)(a) of the Electoral Act. That is, the Electoral Commissioner has determined communications for the purposes of paragraph 321D(3)(b) and paragraph 110C(3)(c) of the *Referendum (Machinery Provisions) Act 1984* (the Referendum Act), discussed below.

Section 7 – Electoral matter exceptions

This section determines communications for the purposes of paragraph 321D(3)(b) of the Electoral Act – that is, communications that are exempt from the authorisation requirements in section 321D of the Electoral Act. These exceptions are in addition to the exceptions set out in subsections 321D(3) and (4) of the Electoral Act.

Graffiti is determined as a communication that is excluded on the basis, amongst other things, that it is not regulated by the Electoral Act, other than in relation to the unlawful marking of ballot papers. In addition, it would be difficult to enforce compliance with the authorisation requirements.

Skywriting is determined as a communication that is excluded on the basis that it would be impracticable and difficult to enforce compliance with the authorisation requirements.

Media releases and envelopes are determined communications and exempt from the authorisation requirements where they contain the name and address of the notifying entity. This ensures that media releases and envelopes are treated in the same way that letters and cards are treated under paragraph 321D(4)(i) of the Electoral Act. Such letters and cards are exempt if they contain the name and address of the notifying entity.

Section 8 – Referendum matter exceptions

This section determines communications for the purposes of paragraph 110C(3)(c) of the Referendum Act – that is, communications that are exempt from the authorisation requirements in section 110C of the Referendum Act. These exceptions are in addition to the exceptions set out in subsections 110C(3) and (4) of the Referendum Act. The exceptions are the same as those listed above in relation to electoral matter exceptions, with the addition of a further communication – namely, a letter or card that contains the name and address of the notifying entity for that letter or card.

The reasons for excluding graffiti and skywriting from the Referendum Act’s authorisation requirements mirror that of the Electoral Act, discussed above. To ensure consistency between the Electoral and Referendum Acts, letters and cards containing the name and address of the notifying entity have also been excluded.

Part 3 – Requirements for notifying particulars

Division 1 – Purpose of this Part

Section 9 – Purpose of this Part

This Part is made for the purposes of paragraph 321D(7)(b) of the Electoral Act. That is, Part 3 of the Determination sets out requirements or particulars for the purposes of the Electoral Act, Referendum Act, *Australian Broadcasting Corporation Act 1983*, *Broadcasting Services Act 1992* and the *Special Broadcasting Service Act 1991*.

Division 2 – Requirements relating to notifying particulars for the purposes of the Electoral Act and Referendum (Machinery Provisions) Act

Section 10 – Purpose of this Division

This Division determines requirements for notifying particulars in relation to a communication for the purposes of subsection 321D(5) of the Electoral Act and subsection 110C(5) of the Referendum Act. In addition to imposing language and formatting requirements, this Division streamlines the requirements in the 2018 Determination (which is repealed by Schedule 1 to the Determination) by breaking down the requirements into two categories discussed in further detail below – namely, printed communications and communications other than printed communications.

Section 11 — requirements relating to notifying particulars for printed communications

This section sets out the requirements for notifying particulars for printed communications – namely, where they must be notified, how they are formatted and placed, as well as language requirements.

Subsection 11(2) mandates that the particulars must be notified at the end of the communication except, in the case of a communication that is published in a journal, in which case the name and address of the printer who printed the communication may be notified at the end of the communication or elsewhere in the journal.

Subsection 11(3) sets out the formatting and placement of notifying particulars for printed communications. The particulars must be reasonably prominent and legible at a distance at which the communication is intended to be read, amongst other things. The purpose of these requirements is to ensure that authorisations are legible and prominent. This is consistent with the objects of Part XXA of the Electoral Act – namely, to promote free and informed voting at elections by enhancing:

- the transparency of the electoral system, by allowing voters to know who is communicating electoral matter;
- the accountability of those persons participating in public debate relating to electoral matter, by making those persons responsible for their communications; and
- the traceability of communications of electoral matter, by ensuring that obligations in relation to those communications can be enforced.

The particulars are required to be legible at a distance at which the communication is intended to be read. This is to ensure that the particulars are legible from the distance that the material is intended to be accessible. For example, if a communication is in the form of a flyer, it should be legible at arms' length. If the particulars in relation to a communication are contained in a school fence sign and a person can physically approach the sign (that is, walk up to it), then it is sufficient if the particulars can be read from a close distance. If the particulars are contained in a billboard or sign that cannot be physically accessed (for example, on the outer wall of a building a few stories high) then the particulars must be able to be read from a distance.

There is currently not a consistent rule for the authorisation of electoral communications in languages other than English. Subsection 11(4) ensures that all communications include the authorisation in English and, if another language is used in that communication, that language. Where multiple languages are used the authorisation must be in English and at least one of the languages (other than English) used in the communication.

Section 12 – Requirements relating to notifying particulars for communications other than printed communications

This section sets out the requirements for notifying communications other than a printed communication.

Subsection 12(2) sets out where or when the particulars must be notified, depending on the method of communication. It streamlines the categories of communication described in the

table in subsection 9(1) of the 2018 Determination by reorganising those categories into four broad categories.

Similarly to subsection 11(3), subsection 12(3) imposes formatting and placement requirements for notifying particulars. The particulars must comply with all four requirements listed in addition to the particulars that are required to be announced under paragraph 12(2)(a) or (b). Subsection 12(4) imposes language requirements to communications other than printed communications which are identical to those imposed by subsection 11(4), discussed above.

Division 3 – Requirements relating to notifying particulars for the purposes of certain Broadcasting Acts

Section 13 – Purpose of this Division

This section provides for the requirements for notifying particulars for the purposes of the subsection 79A(2) of the *Australian Broadcasting Corporation Act 1983*, subclause 4(2) of Schedule 2 to the *Broadcasting Services Act 1992*, and subsection 70A(2) of the *Special Broadcasting Service Act 1991*. These provisions require the ABC, ‘broadcasters’, as defined in subsection 4(1) of the *Broadcasting Services Act* and the SBS respectively to ensure that the required particulars in relation to political matter are announced in accordance with any requirements determined under subsection 321D(7) of the *Electoral Act* where political matter is broadcast at the request of another person.

Section 14 – Requirements relating to notifying particulars for communications broadcast by radio

If a communication is broadcast by radio, the particulars must be notified by being announced at the end of the communication and must comply with the language requirements set out in subsection 14(3).

The language requirements differ from the language requirements set out in subsections 11(4) and 12(4) in that if the communication is only in one language, the particulars must be notified in that language – as opposed to English and that language. If the communication is in 2 or more languages, the particulars must be notified in English – as opposed to English and at least one of the languages (other than English) used in the communication. The requirement for particulars to be in the same language of the communications ensures that members of the target audience for the communication can understand the authorisation information.

Section 15 – Requirements relating to notifying particulars for communications broadcast by television

If a communication is broadcast by television, the particulars must be notified by being announced and shown at the end of the communication and must comply with the language requirements set out in subsection 15(3). The language requirements are identical to those set out in subsection 14(3) for the reasons discussed above.

Schedule 1 – Repeals

Item 1 – The whole of the instrument

This item repeals the *Commonwealth Electoral (Authorisation of Voter Communication) Determination 2018*.